STATE OF MICHIGAN

COURT OF APPEALS

PLATT ELLSWORTH, INC.,

Plaintiff-Appellant,

v

MCNAMEE, PORTER & SEELEY, INC., ARVIN N. BUTTERFIELD, DONALD C. LUND, and ROBERT J. HUFNAGEL,

Defendants-Appellees.

UNPUBLISHED
November 27, 2001

No. 223019
Washtenaw Circuit Court
LC No. 98-009713-CH

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment on a jury verdict awarding it $21,500 in damages. The judgment was reduced by $12,359 in mediation sanctions, leaving plaintiff with an award of $9,141. We affirm.

Plaintiff entered into a contract with defendant McNamee, Porter & Seeley, Inc. (defendant), pursuant to which defendant prepared a detailed site, grading, landscape, and utility plan for property plaintiff owned and was developing, including survey and blueprint designs for construction of a gas station. Defendant misplaced the west and south survey lines because of a staking error, causing plaintiff's partially constructed building to encroach on a Washtenaw County Road Commission easement and causing a temporary shutdown of the construction project. After the project was completed, plaintiff sold the gas station to Motor City Energy[1] in July 1998, and Motor City operated the gas station.

Before trial, the parties agreed to entry of an order granting plaintiff partial summary disposition as to defendant's liability on plaintiff's negligence and breach of contract claims. The case proceeded to trial on damages and liability of the individual defendants. Plaintiff sought damages for additional cement, curb, fill, and contractor costs, along with damages for lost profits and lost interest due to a three-month delay in the completion of the construction project.

[1] The two shareholders of plaintiff own a corporation that is half owner of Motor City Energy.

Plaintiff first contends that the trial court erred in refusing to allow evidence of Motor City's lost profits and an assignment of claim, pursuant to which plaintiff sought recovery for lost profits.

We review the trial court's determinations regarding admission of evidence for abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78; 618 NW2d 66 (2000). However, decisions regarding the admission of evidence often involve preliminary questions of law, which this Court reviews de novo. *Id.*

Motor City was not a party to this case. Plaintiff's pleadings made no mention of any claim asserted on behalf of, or through assignment from, Motor City. During discovery, plaintiff proffered no documents showing an assignment having been made from Motor City to plaintiff, and trial testimony regarding the purported assignment was that it had been executed "recently." MCR 2.111(B) requires a party to plead a statement of facts on which the pleader relies in stating the cause of action with the specific allegations reasonably necessary to inform the adverse party of the nature of the claims the adverse party is called on to defend. Plaintiff filed its complaint on May 27, 1998, and defendants filed their answer on September 11, 1998, after the July 1998 sale to Motor City. Nonetheless, plaintiff did not amend or supplement its complaint, or alert defendant regarding the assignment. We find no error.

Plaintiff also argues that the trial court erred in refusing to allow evidence that it suffered lost profits. The record does not support that such a ruling was made; rather, the trial court ruled that losses actually sustained by plaintiff were recoverable. Plaintiff introduced no evidence that it would have operated the gas station itself. Rather, the testimony was that the sale to Motor City was delayed for three months.

Plaintiff next contends that the trial court erred in allowing evidence of a $6,247 set-off for professional services rendered by defendant corporation. We disagree.

First, plaintiff's contention that the jury deducted the amount of the set off from the judgment is speculative, as the verdict form presented a broadly worded general verdict: "We the jury, find in favor of the plaintiff Platt Ellsworth, Inc., and against the defendant in the following amount:". Further, defendant's answer to plaintiff's complaint pleaded as an affirmative defense that it was entitled to a "set off" of $6,247; for work it had performed but for which it had not been paid by plaintiff. At trial, plaintiff objected to admission of the documents pertinent to the set off (exhibit 5) only on relevance grounds, not on the ground asserted on appeal. Some of the amounts reflected in exhibit 5 were for the staking. However, also included were amounts for work defendant that benefited plaintiff, and none of the work defendant performed to solve the encroachment problem was included. Exhibit 5 was properly admitted as it was relevant to the set off issue defendant properly pleaded. It was for the jury to decide whether defendant was entitled to a set off.

Plaintiff also contends that the trial court erred in sua sponte dismissing two of the individual defendants.[2] Defendant did not move to dismiss the two individuals, and defense

[2] Reference to the "individual defendants" regards only Lund and Hufnagel because plaintiff (continued…)

counsel stated at trial that he did not care whether those defendants remained in the case. Plaintiff presented no evidence that either of the two defendants directly supervised the employee who negligently performed the staking. Further, plaintiff's appellate brief acknowledges that the damages it sustained "would not change with the inclusion of these Defendants in this case." We conclude under these circumstances that even assuming that the trial court's sua sponte dismissal of the individual defendants was error, it was harmless. MCR 2.613(A).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Michael R. Smolenski

(…continued)

consented to the dismissal of Butterfield.